

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

EUGENE A. FISCHER,

Defendant.

Case No. 87-cr-40070-JPG

MEMORANDUM AND ORDER

This matter comes before the Court on defendant Eugene A. Fischer's appeal of the Court's July 16, 2008, order (Doc. 951) dismissing his motion for a writ of audita querela as an unauthorized second or successive motion under 28 U.S.C. § 2255. Pursuant to Federal Rule of Appellate Procedure 22(b)(1), the Court construes Fischer's notice of appeal as a request for a certificate of appealability. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001).

A § 2255 petitioner may not proceed on appeal without a certificate of appealability. 28 U.S.C. § 2253(c)(1); *see Ouska*, 246 F.3d at 1045; *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir. 2005) (*per curiam*) (appeal of dismissal of successive collateral attack requires certificate of appealability). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Ouska*, 246 F.3d at 1045. To make such a showing, the petitioner must "demonstrate that reasonable jurists could debate whether [the] challenge in [the] habeas petition should have been resolved in a different manner or that the issue presented was adequate to deserve encouragement to proceed further." *Ouska*, 246 F.3d at 1046; *accord Tennard*, 542 U.S. at 282; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (certificate of appealability should issue if the petitioner demonstrates "that reasonable jurists would find the

district court's assessment of the constitutional claims debatable or wrong.") The Court finds that no reasonable jurist could debate that Fischer's motion for a writ of audita querela is an unauthorized second or success § 2255 motion over which this Court does not have jurisdiction.

Accordingly, the Court **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED: August 5, 2008

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE